88-129

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HARRY A. COOPER, D.O.,

Petitioner

v.

BERNARD J. AMSTER, D.O., and
DELAWARE VALLEY MEDICAL CENTER, and
MAXWELL STEPANUK, JR., D.O., and
ANDREW NEWMAN, M.D., and
METROPOLITAN HOSPITAL, PARKVIEW DIVISION
Respondents — District Court for the Eastern District of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit
No. 87-1077, C.A. No. 85-6861

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Where a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) has been converted into a Motion for Summary Judgment under Rule 56 by the filing by the defendants and by the plaintiff of Exhibits, as evidentiary material, and by an Order of the District Court, where neither the District Court nor the Court of Appeals have excluded any of the Exhibits from consideration, and where it appears from the Complaint and an Exhibit of the plaintiff that the plaintiff was excluded from emergency room referral privileges at the hospital by the application of standards which were prepared and approved as the result of a combination or conspiracy having the improper purpose of excluding competition and which are not applied uniformly to all applicants for such privileges, does it sufficiently appear that the plaintiff has a cause of action under the anti-trust laws upon which relief can be granted, even though the standards formulated as a result of the conspiracy may, on their face, appear to stand for legitimate and reasonable hospital policy without an anti-competitive purpose?

2. Has the Court of Appeals, in affirming the granting of a Motion for Summary Judgment against the plaintiff on the ground that the plaintiff has not established a cause of action under the anti-trust laws, erred in failing to take note of the allegations of the Complaint and of the Exhibit showing that the standards for emergency room referral privileges were formulated with the improper purpose of excluding competition and in failing to find that the Complaint and the Exhibit established the existence of material issues of fact which precluded the entry of summary judgment?

LIST OF ALL PARTIES TO THE PROCEEDING

The caption of this case, as set forth on the cover of the present Petition for Writ of Certiorari contains the names of all parties to the proceeding. The person on behalf of whom the present Petition for Writ of Certiorari is filed is a private individual person.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The Memorandum and Order of Ditter, J. in the District Court for the Eastern District of Pennsylvania on the motion of defendants Metropolitan Hospital, Parkview Division, Maxwell Stepanuk, Jr., D.O., and Andrew Newman, M.D. to dismiss the Complaint is officially reported at 645 F. Supp. 46 (1986) and unofficially reported in 1987-2 Trade Cas. (CCH) pg. 67, 841. The Order of Ditter, J. in the District Court for the Eastern District of Pennsylvania on the motion of defendants Bernard J. Amster, D.O. and Delaware Valley Medical Center to dismiss the Complaint has not been officially or unofficially reported.

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit filed on March 28, 1988 has not been officially reported, although reference to the decision is made officially at 845 F.2d 1010 (1988) and unofficially at 1988 U.S. App. Lexis 5246.

STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

This Petition for Writ of Certiorari seeks review of the Memorandum Opinion of the United States Court of Appeals for the Third Circuit dated March 28, 1988, affirming the judgment of the District Court. This Memorandum Opinion of the United States Court of Appeals for the Third Circuit was filed and entered on March 28, 1988.

The Petition of the present petitioner for Panel Rehearing and for Rehearing En Banc was denied by Order of the United States Court of Appeals for the Third Circuit dated April 21, 1988 and entered on April 21, 1988.

Jurisdiction is conferred upon the Supreme Court of the United States to review the Memorandum Opinion

and Order of the United States Court of Appeals for the Third Circuit dated March 28, 1988 and April 21, 1988 by the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. Section 1254 (1), which provides, in relevant part, that

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant statutory provisions are as follows:

Act of July 2, 1890, c. 647, Section 1, 26 Stat. 209, 15 U.S.C.A. Section 1, as amended:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years or by both said punishments, in the discretion of the court."

Act of October 15, 1914, c. 323, Section 4, 38 Stat. 731, 15 U.S.C.A. Section 15, as amended:

> "Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the

defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . ."

STATEMENT OF THE CASE

The District Court had jurisdiction over this proceeding involving violation of Federal statutes against restraints on trade and monopolies under 28 U.S.C.A. Section 1337. The District Court had jurisdiction over those Counts of the action involving state common law causes of action under the doctrine of pendent jurisdiction.

The action was brought in the District Court on the basis of Federal causes of action for violations of Section 1 of the Sherman Act.

The allegations of the Complaint are that the plaintiff successfully completed a four year residency at Delaware Valley Medical Center on June 30, 1983, that in February, 1983 the Delaware Valley Medical Center published a revised set of rules, that following the completion of the plaintiff's residency on June 30, 1983 he was told by the defendants, Bernard J. Amster, D.O. and Delaware Valley Medical Center, that he did not meet the requirements of the new rules published in February of 1983, that the plaintiff in March of 1985 requested a formal meeting of the Medical Executive Committee of Delaware Valley Medical Center to consider his request for emergency room privileges, and that, on April 9, 1985, Delaware Valley Medical Center denied the plaintiff's request for such emergency room privileges (R. 10, 11). It is further alleged that Bernard J. Amster, D.O. conspired with Delaware Valley Medical Center for the purpose of furthering his personal pecuniary interests and that in so doing he was acting contrary to the interests of the Delaware Valley Medical

Center, even though he was a corporate officer and/or an employee of the Delaware Valley Medical Center (R. 13). Paragraph 17, incorporated by reference in Count I, having alleged that Delaware Valley Medical Center denied emergency room privileges for the plaintiff, paragraph 31, in Count I, alleges that defendant, Bernard J. Amster, D.O., denied plaintiff access to emergency room privileges (R. 11, 13).

Paragraph 33 alleges that the actions of Amster and Delaware Valley Medical Center constituted an undue restraint of trade and a concerted refusal to deal or group boycott as a *per se* violation of Section 1 of the Sherman Act, that these actions caused injury and damage to the plaintiff, and that these actions posed an actual and threatened burden upon interstate commerce, the effect of which was substantial and direct (R. 13).

The requirements for physicians entitled to have patients assigned or referred to them by the Orthopedic Surgery Emergency Room appear at page 332 of the Record. The four requirements are stated to be an internship and a residency approved by the AOA, certification in Orthopedic Surgery by the American Osteopathic Academy of Orthopedics, completion of at least three years service as an Active Staff physician, and admission to the orthopedic service of at least 50 patients per year (R. 322). These rules and Regulations prepared by Dr. Bernard J. Amster were approved at a regular meeting of the Board of Directors of Delaware Valley Medical Center on September 20, 1982 (R. 323, 325), slightly more than nine months before the successful completion by the plaintiff of his orthopedic residency on June 30, 1983 (R. 10).

The Motion of defendants, Bernard J. Amster, D.O. and Delaware Valley Medical Center, to Dismiss the plaintiff's Complaint alleged that the Complaint did not establish subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and that it did not state a claim upon which relief could be granted (R. 42).

Exhibits "B" through "G" inclusive, attached to the defendants' Motion, included By-laws, Rules and Regulations, minutes of the meeting of the Board of Directors of Delaware Valley Medical Center, and a letter from the plaintiff.

Attached to the Memorandum on Behalf of Plaintiff Re Order to Show Cause, and filed with the District Court, was a Statement on Behalf of Harry A. Cooper, D.O., dated October 13, 1986, for presentation to the Board of Directors of Delaware Valley Medical Center (R. 381). It appears from this Statement that Bernard J. Amster, D.O. caused the Board of Directors of Delaware Valley Medical Center to change the rules relating to emergency room assignments and privileges because he wished to avoid competition from other orthopedists who were then being produced in greater numbers at Delaware Valley Medical Center by reason of its residency program (R. 382). It further appears from the Statement that Dr. Lindenbaum, a member of the general practice staff at Delaware Valley Medical Center and Chairman of the Department of General Practice, testified that he was a member of the Board of Directors of Delaware Valley Medical Center at the time of the approval of the revision by Dr. Amster of the Rules governing assignments from the emergency room to members of the orthopedic staff (R. 382). Dr. Lindenbaum said that the stated and explicit reason for the action taken by the three department chairmen who had proposed the more restrictive rules was that they wished to protect their personal financial positions (R. 382). Dr. Lindenbaum was extremely upset by this situation and stated that his displeasure was one of the reasons for his subsequent resignation from the Board (R. 383). Finally, the Statement points out that the assignment of a Dr. Johnson to the emergency room to act for Dr. Amster indicates that there were "different standards for different people" (R. 383).

In the Answer of the defendants, Amster and Delaware Valley Medical Center, to the plaintiff's Memorandum, objections were voiced to the filing of the Statement on Behalf of Harry A. Cooper, D.O. on the ground that the document did not take the form of an affidavit, on the ground that only the Complaint should be considered in connection with a Motion to Dismiss, and on the ground that the materials revealed by the Statement were impertinent, immaterial and scandalous (R. 385 *et seque*). These objections were made following the filing by counsel for defendants of a Motion to Dismiss with attached Exhibits "A" through "H", only one of which (the affidavit of Dr. Glass [R. 329]) took the form of an affidavit or was supported by any affidavit or certification of authenticity. The District Court had, on February 5, 1986, ruled that the Motion to Dismiss of defendants, Amster and Delaware Valley, should be construed as a Motion for Summary Judgment (R. 395). The objection that documents other than the Complaint could not be considered in connection with the pending Motion is therefore inconsistent with the additional filings by the defendants which had taken place and with the ruling of the District Court. The Record does not indicate that the District Court ever granted any motion to strike the Statement on Behalf of Harry A. Cooper, D.O. or declined to consider the document in conjunction with all of the other documents which had been filed by counsel for the defendants.

Originally, the action was brought against five defendants, Bernard J. Amster, D.O., the Delaware Valley Medical Center, Maxwell Stepanuk, Jr., D.O., Andrew Newman, M.D., and Metropolitan Hospital — Parkview Division. After the filing of Motions to Dismiss by the various defendants, the District Court entered an Order severing the claims of the plaintiff against Bernard J. Amster, D.O. and the Delaware Valley Medical Center from his claims against all of the other defendants. An

Order was then entered dismissing the plaintiff's Complaint against the defendants Maxwell Stepanuk, Jr., D.O., Andrew Newman, M.D., and Metropolitan Hospital — Parkview Division. No appeal was ever taken from that Order, because the controversy among the concerned parties was resolved by an amicable agreement.

There remained only the action against Bernard J. Amster, D.O. and the Delaware Valley Medical Center.

The District Court had filed both a Memorandum and an Order dismissing the Complaint against the defendants Maxwell Stepanuk, Jr. D.O., Andrew Newman, M.D. and Metropolitan Hospital — Parkview Division. That Memorandum and Order is officially reported at 645 F. Supp. 46 (1986) and it also appears at page 404 of this Record. However, after hearing oral argument on the Motion to Dismiss filed by the defendants Bernard J. Amster, D.O. and the Delaware Valley Medical Center, which had been converted into a Motion for Summary Judgment, the District Court entered only an Order dismissing the Complaint, without leave to file an Amended Complaint, stating that the reasons for dismissal were the same as those which had been stated in the Memorandum attached to the Order dismissing the Complaint against the defendants Stepanuk, Newman, and Metropolitan Hospital — Parkview Division. That Order, dated August 7, 1986, which is not reported either officially or unofficially, appears at page 408 of this Record.

A timely Notice of Appeal to the United States Court of Appeals for the Third Circuit from the final Order of August 7, 1986 dismissing the Complaint against defendants Bernard J. Amster, D.O. and Delaware Valley Medical Center was filed, but the Court of Appeals elected to decide the case on the Briefs and on the Record, without hearing oral argument. The decision of the Court of Appeals affirming the result in the District Court was filed on March 28, 1988 and, on April 21,

1988, the Court entered its Order denying the plaintiff's petition for panel rehearing and for rehearing en banc.

ARGUMENT

The first question presented for review on this Petition for Writ of Certiorari has been occasioned by the erroneous holding of the United States Court of Appeals for the Third Circuit to the effect that the plaintiff has not established a cause of action under the anti-trust laws where it appears that the hospital has adopted objective criteria governing the eligibility of physicians for the referral list and where the plaintiff physician has not pleaded or proved anything which suggests that the criteria did not express a perfectly legitimate and reasonable policy.

This holding totally ignores the significance and effect of pleadings and evidence showing that there was an underlying improper and anti-competitive motivation for the criteria or regulations which, on their face, may appear to be an expression of legitimate and reasonable policy. If the improper and anti-competitive motivation has been pleaded and proved, the result should be a finding of violation of the anti-trust law. If the improper and anti-competitive motivation has been pleaded, then, where the defendants have not filed affidavits to establish that the pleading is false, the Courts should be precluded from entering a summary judgment against the plaintiff and from dismissing the Complaint, since a material issue of fact has been created as to the improper motivation of the criteria, standards, or regulations adopted and applied by the hospital. Prior cases in the Third Circuit and the recent decision by the Supreme Court of the United States in the case of *Patrick v. Burget*, 108 S. Ct. 1658 (1988) have all indicated that the plaintiff has made out a cause of action for violation of the anti-trust laws when he has pleaded that there has been an improper and anti-competitive motivation for

criteria, standards, regulations, or actions of hospitals which appear, on their face, to be embodiments of legitimate and reasonable policies. The decision of the United States Court of Appeals for the Third Circuit in the present case is therefore in conflict with prior cases in that Circuit and with the most recent and controlling decision by the United States Supreme Court.

It is to be noted that the Court of Appeals, in its decision, raised no question as to whether or not in the present case there was a proper showing as to the identity of the parties to the conspiracy or as to the capacity of those parties to enter into a conspiracy. We wish to show here, however, that there can be no question on those points.

The Record shows that on July 30, 1982, Dr. Amster, the Chairman of the Department of Orthopedic Surgery at the Delaware Valley Medical Center, proposed the new restrictive regulations for participation of orthopedic surgeons in emergency room privileges (R. 322). These new restrictive regulations were approved by the Board of Directors of Delaware Valley Medical Center on September 20, 1982 (R. 324). It was revealed by Dr. Amster at the time of the meeting of the Board of Directors that his purpose in proposing the new regulations was to protect his personal financial position (R. 382). In February of 1983, Rules and Regulations of the Department of Emergency Medicine were promulgated, embodying either expressly or by implication the regulations which had been approved on September 20, 1982 (R. 28). The plaintiff, having completed his orthopedic residency at Delaware Valley Medical Center on June 30, 1983 (R. 10), was informed by the defendants that he did not meet the requirements of the Rules of February, 1983 for participation in emergency room services (R. 11). In February and/or in March of 1985, the plaintiff requested from the Medical Executive Committee of Delaware Valley Medical Center the emergency room privileges which are here in issue (R. 11 and

327). On April 9, 1985, the request for privileges was denied in a letter from the Secretary of the Medical Executive Committee (R. 36). This denial is alleged by the Complaint to have been a denial by defendant Delaware Valley Medical Center (R. 11).

The plaintiff has alleged a combination or a conspiracy as between Dr. Amster and the Delaware Valley Medical Center, the entity which carried out and executed the anti-competitive action. These allegations properly identify the parties to the combination or conspiracy and also satisfy the requirement that there must be at least two or more parties to a combination or conspiracy in violation of the anti-trust laws.

Even though Dr. Amster might be deemed to be an officer or employee of Delaware Valley Medical Center, there has still been a showing that he had independent standing to conspire with the hospital. In Paragraph 32 of the Complaint, it was alleged that Dr. Amster conspired with the hospital only to further his own personal pecuniary interest (R. 13). In the Statement on Behalf of Harry A. Cooper, D.O., it appears that Dr. Amster proposed the new and restrictive regulations relating to emergency room privileges for the purpose of protecting his personal financial position (R. 382). The hospital, through its Board of Directors, then acquiesced in Dr. Amster's private purpose and gave its approval to the proposed regulations (R. 325). Where a corporate officer or employee acts for his own interest and outside the interests of the corporation, he is legally capable of conspiring with his employer for purposes of Section 1 of the Sherman Act. *Weiss v. York Hospital*, 745 F. 2d 786, 813, Note 43 (1984). In *Johnston v. Baker*, 445 F. 2d 424, 426, 427 (1971), the Third Circuit recognized that there could be a conspiracy between a corporation and an officer or employee acting "as a result of personal motives." As the Court noted in *Weiss*, this rule has been noted with approval in *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F. 2d 391, 399 (1974) and *H & B*

Equipment Co., Inc. v. International Harvester Co., 577 F. 2d 239, 244 (1978). Application of this rule was noted by the Supreme Court of the United States in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 2741, Note 15, 81 L. Ed. 2d 628 (1984) without adverse comment. It has therefore been sufficiently shown in this case that there were two separate parties to the alleged conspiracy.

We turn now to the materials which were before both the District Court and the Court of Appeals raising as an issue of material fact and/or tending to prove that the formulation and application of the criteria, standards, or regulations for the granting of emergency room referral privileges had an improper and anti-competitive motivation. In Paragraph 32 of the Complaint, it was alleged that Dr. Amster conspired with the hospital only to further his own personal pecuniary interests (R. 13). This is a sufficient allegation of improper and anti-competitive motivation. Documents placed in the record by counsel for the defendants show that Dr. Amster proposed on July 30, 1982 a new set of regulations for emergency room privileges for orthopedic surgeons (R. 322) which was approved by the Board of Directors of the hospital on September 20, 1982 (R. 324). The Statement on Behalf of Harry A. Cooper, D.O. refers to the testimony of Dr. Lindenbaum that the new regulations proposed by Dr. Amster were for the purpose of protecting his personal financial position (R. 382). The Statement is also to the effect that the new regulations have not been applied uniformly to various doctors (R. 383). The moving parties on the Motion to Dismiss which was converted into a Motion for Summary Judgment by Judge Ditter's Order of February 5, 1986 (R. 395) have not placed any evidence or sworn or certified materials in the record which would indicate that the Board of Directors or the Medical Executive Committee had any motives in accepting the proposed regulations

other than a motive to acquiesce in the purposes of Dr. Amster. The pleadings and the Exhibits filed by both sides in connection with the Motion for Summary Judgment have, at the very least, shown the existence of material issues of fact as to the motivations of Dr. Amster and of the hospital. The existence of such material issues of fact should have prohibited the entry of summary judgment against plaintiff or the entry of a judgment of dismissal.

The decision of the Court of Appeals has completely ignored the existence of these material issues of fact by ignoring the pleadings and the Exhibits. There was never any Order of either the District Court or of the Court of Appeals excluding any of the numerous Exhibits presented by both sides from consideration in connection with the Motion for Summary Judgment. Neither the District Court nor the Court of Appeals made any statement whatever as to whether or not it was or was not considering any of the Exhibits. For all that appears from the texts of the Court opinions the Motion was considered entirely without reference to any of the Exhibits which had been filed by either side, even though there were no orders or pronouncements excluding those Exhibits from consideration. This being so, both Courts should have considered the facts and issues presented by the Exhibits.

If, however, the District Court and the Court of Appeals did, in fact, exclude the Exhibits from consideration, they should have taken properly into account all of the allegations of the Complaint. They have both, to the contrary, totally ignored the allegations in the Complaint of improper and anti-competitive motivation.

In *Williams v. Kleaveland*, 534 F. Supp. 912 (1981) in the District Court for the Western District of Michigan, it was recognized that even where the good faith of standards established by the hospital must be presumed it is still a relevant issue as to whether or not the

individual doctors applying the standards acted for illegal purposes. The Court said:

> "Since the hospital is required to establish and maintain standards pursuant to statute, and since the hospital cannot act except through its personnel, good faith must be presumed. Plaintiff must bear the burden of proving that the individual doctors acted for illegal purposes to benefit their private practices rather than to maintain the legitimate standards of the hospital."

It was recognized again in *Pontius v. Childrens' Hospital*, 552 F. Supp. 1352, 1372 (1982) that a plaintiff who can prove that the hospital decision was motivated by an anti-competitive reason will still have a viable cause of action. The Court said:

> "If a hospital decides, following a hearing which meets the requirements of due process, to terminate a physician's staff privilege for reasons valid under the anti-trust laws, and those reasons are supported by substantial evidence, no factual question remains as to Section 1 claims — the "restraint" is a reasonable one. If, on the other hand, the hospital's decision is not supported by substantial evidence, or the procedure used to reach the decision is substantially defective, a question of fact will be presented as to the reasons for the privilege decision. It is important to note that a mere showing that the reasons advanced by the hospital are not supported by substantial evidence will not prove a plaintiff's case for him. *Such a plaintiff will still have to prove that the hospital's decision was motivated by an anti-competitive reason rather than a legitimate one.*" (Emphasis supplied).

In *Miller v. Indiana Hospital*, 843 F. 2d 139 (1988), the Third Circuit Court of Appeals itself reached a decision which is clearly contrary to the reasoning of the

decision in the present case. The District Court had granted the motion of the hospital for summary judgment. The Court of Appeals reversed and remanded for further proceedings, saying,

> "The hospital argues that its conduct was patently reasonable because Miller, after a full hearing approved by the State Court was found to have demonstrated professional incompetence and unprofessional conduct. However, Miller has produced evidence which, if believed by the jury, would show that, in fact, the hospital's revocation of his privileges, although ostensibly for professional incompetency and unprofessional conduct, was motivated by the anti-competitive purpose of destroying Miller's competition or prospective competition. . . . The evidence produced by Miller is sufficient to raise a genuine issue of material fact as to whether the hospital's conduct in revoking Miller's staff privileges was, as the hospital claims, because of incompetency and hence a reasonable restraint or whether it was a result of anti-competitive motivation and therefore constituted a prohibited restraint of trade. That issue is for the fact-finder which, if it decides that the restraint of trade was unreasonable, will also fix the amount of any damages".

In *Patrick v. Burget*, 108 S. Ct. 1658 (1988), the Supreme Court of the United States has rendered a decision which validates the contentions of this Petition by showing that, where the state action defense is not available, and where the actions of the hospital on their face appear to be expressions of legitimate and reasonable policy, the plaintiff will still have a valid cause of action for violation of the anti-trust laws if he can plead and prove, as did the plaintiff Patrick, that the actions of the hospital were really motivated by improper and anti-competitive underlying purposes.

Patrick, in the United States District Court, had contended that the Clinic partners had initiated and participated in the hospital peer-review proceedings to reduce competition from Patrick rather than to improve patient care. The contention was denied by the defendants, but the District Court submitted the dispute to the jury with an instruction that the jury could rule in favor of Patrick if it found that the defendants' conduct was the result of a specific intent to injure or destroy competition. The Court of Appeals for the Ninth Circuit agreed that there has been substantial evidence that the defendants had acted in bad faith in the peer-review process for the purpose of disadvantaging a competitor rather than to improve patient care. The District Court was reversed, of course, because of the conclusion of the Court of Appeals that the state action defense was applicable. When the United States Supreme Court reversed the Court of Appeals by holding that the state action defense would not be applicable, it left untouched a situation in which the plaintiff had been permitted by the District Court to recover against the defendants because he had alleged and proved that the conduct of the defendants, ostensibly and purportedly for the purpose of upholding hospital standards, was in reality the result of a specific intent to injure or destroy competition. The United States Supreme Court has therefore clearly indicated that a plaintiff has a valid cause of action for violation of the anti-trust laws where he is able to plead and/or prove that there has been an anti-competitive motivation for hospital actions which give the appearance of having been taken for legitimate and reasonable policy reasons.

These cases indicate that this Honorable Court should grant the present Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Third Circuit, which has totally ignored the plaintiff's allegations of improper and anti-

competitive motivation as well as the materials in the Exhibits which support those allegations.

The second question presented for review by this Petition for Writ of Certiorari is clearly implied by the first question. The allegations of the Complaint and the Exhibits, including specifically the Exhibit entitled Statement on Behalf of Harry A. Cooper, D.O. (R. 382), do clearly raise a material issue of fact as to whether or not the criteria and regulations were formulated and applied by the hospital to the plaintiff for underlying reasons which were improper and anti-competitive. The plaintiff maintains that since the parties on both sides had submitted voluminous Exhibits and since the Court had converted the Motion to Dismiss into a Motion for Summary Judgment, the Court should have considered all of the Exhibits in making a determination as to whether or not there were genuine and material issues of fact which should preclude the entry of summary judgment against the plaintiff. Both sides submitted Exhibits which were not in the form of affidavits. The Courts made no orders or decisions excluding the Exhibits from consideration. The Exhibits should therefore have been considered in conjunction with the pleadings.

If, however, it is thought that the Exhibits should not have been considered, because they were not in the form of affidavits, then the District Court and the Court of Appeals were still obliged to look at the pleadings and to recognize that the plaintiff had sufficiently alleged an improper and anti-competitive motivation for the formulation of the criteria and regulations which were used to deny him emergency room referral privileges. The obligation to recognize that a material issue of fact is raised by the pleadings which precludes the entry of summary judgment was ignored by the lower Courts. If the District Court and the Court of Appeals considered that they were treating the motion of the defendants as a Motion to Dismiss, they were obliged to recognize that the plaintiff's Complaint was not demurrable, simply

because it *did* sufficiently allege an improper and anti-competitive purpose for the criteria and regulations as well as a conspiracy to implement that improper and anti-competitive purpose.

It is clear that the Court of Appeals for the Third Circuit has made a decision squarely in conflict with other decisions in the same Circuit and with the decision of the Supreme Court of the United States in the case of *Patrick v. Burget*.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY A. COOPER, D.O. *Plaintiff*	:	CIVIL ACTION No. 85-6861
v.	:	
BERNARD J. AMSTER, D.O., et al. *Defendants*	:	

MEMORANDUM AND ORDER

DITTER, J. August 7, 1986

Plaintiff is a doctor. He brings this anti-trust action against two hospitals and three other doctors alleging that because the hospitals do not refer emergency patients to him, the defendants have violated section 1 of the Sherman Act and various state laws.[1] In no other way is plaintiff precluded from practicing medicine or using the hospitals' facilities. Presently before me is the motion of one of the hospitals, Metropolitan Hospital-Parkview Division, and two of its staff members, to dismiss the complaint for lack of subject matter jurisdiction under Fed. R.Civ. P. 12 (b)(1) and for failure to state a claim pursuant to Fed. R.Civ. P. 12(b)(6). The motion must be granted on both grounds.

In the first place, plaintiff's anti-trust claims must be dismissed for lack of subject matter jurisdiction because they are clearly frivolous and, in any event, lack ripeness. This action is frivolous because plaintiff is not being precluded from doing anything by any of the

1. There is no contention that there has been any agreement between the hospitals or between their respective staffs with regard to plaintiff.

defendants. He may find his own patients, accept patients from anyone who will refer them, admit patients to the hospital, treat them in the emergency room, and use any of the hospital's facilities. The sole basis of his suit is that the hospital refers patients to other doctors, but does not refer patients to him. This is in keeping with the hospital's policy that it will not refer patients to a doctor who has been on its staff for less than five years unless the doctor is associated with other qualified doctors. Plaintiff was not singled out for this treatment nor has he pointed to anything which suggests that this is not a perfectly legitimate and reasonable policy. There is nothing in the law that requires the hospital to be his bird dog just because it is the bird dog for other doctors who have been associated with it for a longer period of time. Plaintiff may wish that the hospital would refer patients to him, but the Sherman Act does not require it to do so.

Additionally, the ripeness doctrine precludes this court from exercising subject matter jurisdiction. The hospital's internal administrative procedures provide plaintiff the opportunity to present his grievance before its governing body, the board of directors. Plaintiff, however, has failed to take the necessary steps to do so. Consequently, the hospital has never considered, much less decided, the merits of his grievance. Plaintiff seeks to excuse his failure by asserting that it would be a useless gesture on his part. This conclusion is based entirely upon his own perceptions and conjecture and is wholly unsupported. The hospital's internal procedures are neither onerous nor, on their face, futile. It is little enough to ask that plaintiff get a definitive no from the hospital before he comes to court for an injunction, treble damages, and the whole panoply of Sherman Act relief.

Finally, plaintiff's anti-trust claims must also be dismissed for failure to state a claim upon which relief can be granted for the same reasons that they were

dismissed as frivolous under Fed. R.Civ. P. 12(b)(1) above. Because all of plaintiff's federal claims are dismissed, I decline to exercise pendent jurisdiction over his state claims which are also dismissed.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY A. COOPER, D.O.	:	CIVIL ACTION
	:	No. 85-6861
v.	:	
	:	
BERNARD J. AMSTER, D.O., et al.	:	

ORDER

AND NOW, this 12th day of January, 1987, after hearing the arguments of counsel, and plaintiff having failed to show cause why his action should not be dismissed against defendant's Bernard J. Amster, D.O., and Delaware Valley Medical Center, it is hereby ordered that plaintiff's action is dismissed for the same reasons it was previously dismissed against the other defendant hospital and doctors. *See Cooper v. Amster*, 645 F. Supp. 46 (E.D. Pa. 1986).

BY THE COURT:

_____

J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1077

HARRY A. COOPER, D.O.,

Appellant

v.

BERNARD J. AMSTER, D.O., CHAIRMAN — DEPARTMENT OF SURGERY, and DELAWARE VALLEY MEDICAL CENTER, and MAXWELL STEPANUK, JR., D.O., and ANDREW NEWMAN, M.D., and METROPOLITAN HOSPITAL, PARKVIEW DIVISION,

Appellees

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 85-6861)
District Judge: Honorable J. William Ditter, Jr.

Submitted under Third Circuit Rule 12(6)
March 7, 1988

Before: WEIS, GREENBERG, and ALDISERT,
Circuit Judges.
(Filed: March 28, 1988)

MEMORANDUM OPINION OF THE COURT

WEIS, *Circuit Judge*.

Plaintiff is an orthopedic specialist on the staff of the Delaware Valley Medical Center. Defendant Bernard J. Amster, D.O. is Chairman of the Center's Division of Orthopedics.

After successfully completing a four-year residency in June, 1983, plaintiff was granted medical staff membership with concommitant clinical privileges at the hospital. Some two years later, he asked to be placed on the hospital's rotation list making him eligible for patient referrals by the emergency room.

Adopted before plaintiff joined the staff, hospital regulations required staff members to meet four requirements before being included on the rotation list:

> 1. Completion of an AOA approved internship and residency;
>
> 2. Certification in orthopedic surgery by the American Osteopathic Academy of Orthopedics;
>
> 3. Status for at least three years as an active staff physician;
>
> 4. Admission of at least fifty patients per year from the physician's practice to the hospital's orthopedic service.

The Medical Executive Committee denied the plaintiff's application, advising him that he failed to satisfy the necessary criteria.

Plaintiff has pursued administrative appeals at the hospital while seeking judicial relief. In the district court, he alleged a violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and asserted pendent state law claims. Plaintiff also raised these common law causes of action in a related case still pending in the state court.

The district court entered summary judgment for the defendants, noting that the "plaintiff is not being precluded from doing anything by any of the defendants." The court observed that he may "find his own patients, accept patients from anyone who will refer them, admit patients to the hospital, treat them in the emergency room, and use any of the hospital facilities."

Essentially, the plaintiff's sole claim is that the hospital refers emergency room patients to other doctors, but not to him.

The hospital has adopted objective criteria governing the eligibility of physicians for the referral list. Because these standards focus on the doctor's years of experience in practice, they are relevant to professional competence — obviously a matter of serious concern to the hospital which could be held liable for negligently referring a patient to an incompetent staff member. As the district court found, plaintiff was neither singled out for special treatment, "nor has he pointed to anything which suggests that [the criteria do not express] a perfectly legitimate and reasonable policy." We conclude that the hospital's policy does not violate the antitrust laws.

Having determined that plaintiff has not established a cause of action under the antitrust laws, we need not discuss the other grounds briefed by the parties. The district court properly entered summary judgment for the defendants, and therefore we will affirm.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1077

HARRY A. COOPER, D.O.,

Appellant

v.

BERNARD J. AMSTER, D.O.,
CHAIRMAN — DEPARTMENT OF SURGERY, and
DELAWARE VALLEY MEDICAL CENTER,
and MAXWELL STEPANUK, JR., D.O., and
ANDREW NEWMAN, M.D., and METROPOLITAN
HOSPITAL, PARKVIEW DIVISION,

Appellees

D.C. Civil No. 85-6861

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge*, SEITZ,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, ALDISERT
and WEIS, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT

Circuit Judge

Dated: April 21, 1988

(2)

No. 88-129

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HARRY A. COOPER, D.O.,

Petitioner

v.

BERNARD J. AMSTER, D.O., and
DELAWARE VALLEY MEDICAL CENTER, and
MAXWELL STEPANUK, JR., D.O., and
ANDREW NEWMAN, M.D., and
METROPOLITAN HOSPITAL, PARKVIEW DIVISION,

Respondents

BRIEF IN OPPOSITION FOR RESPONDENTS

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit
No. 87-1077, C.A. No. 85-6861

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QUESTION PRESENTED

1. Whether Petitioner's sole allegation that respondents had an anti-competitive motive in formulating and implementing admittedly objective criteria, which determined the eligibility of staff physicians for inclusion on an emergency room referral list, is sufficient to sustain a Section 1 Sherman Antitrust Act cause of action where unequivocally, the criteria, on their face and as applied, were pro-competitive, legitimate, and reflected a reasonable hospital policy.

LIST OF PARTIES

The interested parties in this matter are limited to petitioner, Harry A. Cooper, D.O. and respondents, Bernard J. Amster, D.O. and Delaware Valley Medical Center.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

Cases Cited: Page

TABLE OF AUTHORITIES—(*Continued*)

Cases Cited: Page

Statutes Cited:

No. 88-129

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

HARRY A. COOPER, D.O.,

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v.

BERNARD J. AMSTER, D.O., and
DELAWARE VALLEY MEDICAL CENTER, and
MAXWELL STEPANUK, JR., D.O., and
ANDREW NEWMAN, M.D., and
METROPOLITAN HOSPITAL, PARKVIEW DIVISION,

Respondents

STATEMENT OF THE CASE

Harry A. Cooper, D.O. (hereinafter "petitioner") instituted this lawsuit based upon the denial of his request to be placed on the emergency room rotation list at Delaware Valley Medical Center (hereinafter "respondent Delaware Valley").

Historically, petitioner completed his orthopedic surgical residency at respondent Delaware Valley on June 30, 1983. Thereafter, he immediately applied for and was granted, effective July 19, 1983, medical staff membership and concomitant clinical privileges at Delaware Valley. (A. 330). After enjoying medical staff membership and concomitant clinical privileges for approximately two years, petitioner requested in February or March of 1985 that he be placed on the emergency room rotation list. Importantly, irrespective of the decision on petitioner's request for inclusion on said list, petitioner continues to enjoy medical staff membership and clinical privileges.

In February 1983, prior to petitioner's completion of his residency and more than two years prior to his request for inclusion on the emergency room rotation list, petitioner as well as all medical staff members were duly advised that, for quality of care reasons, a physician would have to satisfy four criteria to be placed on said list. The criteria consisted of the following:

1. Completion of an AOA approved internship and AOA approved residency;

2. Certification in orthopedic surgery by the American Osteopathic Academy of Orthopedics;

3. Status as an active staff physician for at least three (3) years; and,

4. Admission to the orthopedic service of at least 50 patients per year from the physician's practice. (A. 322, 325).

Petitioner did not satisfy the required criteria and was so advised on April 9, 1985 by the Medical Executive Committee of respondent Delaware Valley. (A. 36). The petitioner subsequently pursued his administrative remedies at respondent Delaware Valley (A. 395, 397-400) and filed the instant lawsuit.

Petitioner instituted the instant lawsuit by filing a Complaint against Bernard J. Amster, D.O., (hereinafter "respondent Amster"), Chairman of the Department of Surgery and Chief of the Division of Orthopedic Surgery, and respondent Delaware Valley (collectively "respondents") as well as Maxwell Stepanuk, Jr., D.O., Andrew Newman, M.D. and Metropolitan Hospital-Parkview Division (hereinafter "co-defendants"). Plaintiff's Complaint asserts a federal claim under §1 of the Sherman Antitrust Act, 15 U.S.C. §1, and pendent state law claims for tortious interference with prospective contractual relations, promissory estoppel, fraud and misrepresentation, breach of implied contract and punitive damages.

Respondents and co-defendants filed separate Motions to Dismiss plaintiff's Complaint. The United States District Court for the Eastern District of Pennsylvania, (per J. Ditter), entered an Order severing the plaintiff's claims against respondents from those against co-defendants. (A. 394). The court subsequently dismissed plaintiff's claims against co-defendants. (A. 403, published as *Cooper v. Amster*, 645 F. Supp. 46 (E.D. Pa. 1986)). Plaintiff did not appeal this Order.

Respondents attached supplemental materials to their Motions to Dismiss. (A. 42-347). In accordance with Fed. R. Civ. P. 12(b), Judge Ditter filed an Order declaring he would construe respondents' Motions to Dismiss as a Motion for Summary Judgment. (A. 395). The Court, however, did not articulate in its Opinion whether it considered the supplemental materials in reaching its decision.[1]

Judge Ditter, in an Order without Memorandum, dismissed petitioner's claims against respondents and incorporated by reference the reasoning expressed in his Opinion and Order dismissing the claims against the three co-defendants. (A. 403). The Court dismissed plaintiff's claims against co-defendants pursuant to Fed. R. Civ. P. 12(b)(1), because his claims were frivolous and not ripe for adjudication, and pursuant to Fed. R. Civ. P. 12(b) (6) for frivolousness. The Court declined to exercise pendent jurisdiction over the plaintiff's state

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1. Although Judge Ditter, in a Pretrial Order, stated that he would consider Respondents' Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12 as a Motion for Summary Judgment, the District Court did not expressly state in its opinion that it was in fact granting summary judgment. The United States Court of Appeals for the Third Circuit appears to have assumed that the District Court granted summary judgment for Respondents. Inasmuch as the District Court and the Court of Appeals found Petitioner's Sherman Act cause of action to be deficient on legal grounds, the distinction has no significance.

claims. Although it is unclear whether defendants' Motions to Dismiss, in fact, were converted into a Motion for Summary Judgment, Judge Ditter's decision was proper and appropriate whether based upon Rule 12 or Rule 56 of the Federal Rules of Civil Procedure. Plaintiff subsequently appealed the District Court's Order.

The United States Court of Appeals for the Third Circuit affirmed the grant of summary judgment by way of a Memorandum Opinion per Circuit Judges Aldisert, Weis and Greenberg. (Petitioner's Appendix at p. A-5). The Court of Appeals noted that the petitioner was denied placement on the emergency room referral list based upon objective criteria governing the eligibility of physicians for this list. The Court reasoned that, because the standards focus on a physician's years of experience and practice, they are relevant to professional competence. The Court observed that the petitioner has not pointed to anything suggesting that the criteria are not based upon a perfectly legitimate and reasonable hospital policy, particularly in light of respondent medical center's potential for vicarious liability under state law. Thus, the Third Circuit held that the petitioner did not establish a cause of action under the antitrust laws. Petitioner subsequently filed a Petition for Panel Rehearing and for Rehearing En Banc, which was denied by Order of the United States Court of Appeals for the Third Circuit dated and entered on April 21, 1988. (Petitioner's Appendix at A-8). Petitioner subsequently filed the instant Petition for Writ of Certiorari.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF A WRIT OF CERTIORARI

Petitioner's thesis, however cogent it may seem at first blush, attempts to persuade this Court that, standing alone, evidence of a purported conspiracy is sufficient to sustain a cause of action pursuant to §1 of the Sherman Antitrust Act. Petitioner's thesis, as the lower courts recognized, is fatally flawed and improperly ignores years of antitrust decisional authority. In short,

although petitioner goes to extreme lengths to illustrate an alleged conspiracy (i.e., conspiratorial motive), petition does not address the additional equivocal requirements that there be evidence that the alleged conspiracy produce adverse effects upon the competition generally, that the challenged conduct (i.e., emergency room criteria, *supra*, at page 2), was improper or illegal, *and* that petitioner was injured as a proximate result of said conduct.

Moreover, petitioner has not articulated any viable reasons under Rule 17, which governs such review, for the grant of a Writ of Certiorari. Indeed, an analysis under that Rule indicates that a Writ of Certiorari should not be granted. The United States Court of Appeals for the Third Circuit has *not* rendered a decision in conflict with any other Federal Court of Appeals, has *not* departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, and has *not* decided an important question of federal law that is unsettled by this Court or decided such a question in conflict with applicable decisions of this Court. *See Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923).

In his petition for Certiorari, petitioner asserts that the District Court and Court of Appeals improperly granted summary judgment. He contends that allegations in the pleadings and exhibits[2] demonstrate a

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2. Petitioner asserts that the Complaint in this case and an exhibit entitled "Statement on Behalf of Harry A. Cooper, D.O." create a genuine issue of material fact as to the respondents' alleged anti-competitive motive in formulating and applying the criteria for the inclusion of practitioners on the Emergency Room Referral Roster. Petitioner asserts that the Court of Appeals ignored the Complaint and this exhibit. He states that neither the District Court nor the Court of Appeals made any statement as to whether it was considering any of the exhibits. Petitioner's reliance on these documents, however, is misplaced.

First, merely because the Courts did not mention the exhibits, does not indicate that they ignored them. There is no rule requiring

genuine issue of material fact as to the existence of an improper anti-competitive motivation for adoption of the admittedly objective criteria governing the eligibility of physicians for inclusion on the emergency room rotation roster, criteria which, on their face, express a legitimate

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NOTES *(Continued)*

that a court specify each and every exhibit it considers in determining a Motion for Summary Judgment. Petitioner does not cite any authority for this proposition and it is entirely counter-intuitive.

Second, the exhibits upon which petitioner relies were improper. Rule 56(e) of the Federal Rules of Civil Procedure emphasizes that a party may not rest on the mere allegations in a pleading, but must present evidentiary matter showing there is a genuine issue of material fact. The Rule states:

Where a Motion for Summary Judgment is made and supported as provided in this Rule, *an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Fed. R. Civ. P. 56(e) (emphasis added).

Additionally, the attorney statement, drafted and signed by Petitioner's counsel, is insufficient. Courts emphasize that such attorney statements containing alleged facts not within the attorney's personal knowledge are not sufficient to create a genuine issue of material fact and preclude summary judgment. *See, e.g., Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 896 & n.4 (1950), *overruled on other grounds, Lear, Inc. v. Atkins*, 395 U.S. 653 (1968); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162 (W.D. Mo. 1985); *Nakao v. Rushen*, 580 F.Supp. 718 (N.D. Cal. 1984), *vacated on other grounds*, 766 F.2d 410 (9th Cir. 1985).

Finally, consideration of the aforementioned exhibits would have been unnecessary and irrelevant. As stated above, the opinions of the District Court and Court of Appeals do not clearly demonstrate whether Respondents' Motions were decided pursuant to Federal Rule of Civil Procedure 12 or Federal Rule of Civil Procedure 56. If the Motions were decided under Rule 12, the exhibits would be properly excluded from consideration. Even if, however, the Motions were decided pursuant to Rule 56, the decisions were based on legal as opposed to factual grounds and thus consideration and discussion of the exhibits would have been unnecessary.

and reasonable hospital policy. Even if, *arguendo* petitioner's assertions are accepted by the Court, however, they are not dispositive of the propriety and appropriateness of the decisions of the Court of Appeals and District Court in this case. Even if, *arguendo,* petitioner did establish a genuine issue of material fact as to the existence of an anti-competitive motive underlying the adoption of the criteria, which respondents steadfastly deny, summary judgment was proper and appropriate inasmuch as petitioner has not established any genuine issue of material fact as to the existence of any of the other essential elements of a antitrust cause of action under §1 of the Sherman Act. Specifically, petitioner has not presented any evidence or facts to show a conspiracy, an unreasonable restraint of trade or an antitrust injury. Moreover, petitioner has not challenged the legitimacy of the criteria or the pro-competitive and reasonable hospital policy furthered by the criteria. The reasoning and decisions of the District Court and the Court of Appeals were correct and appropriate. Thus, the grant of a Writ of Certiorari by this Court is unnecessary.

The United States Supreme Court, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), articulated the standard to be applied in deciding Motions for Summary Judgment in federal antitrust cases. The Court observed that, to survive a Motion for Summary Judgment, the responding party must establish that there is a genuine issue of material fact as to whether the moving party entered into an illegal conspiracy that caused him to suffer a cognizable injury. *Id.* at 1355-56. The Court emphasized that the responding party must show more than a conspiracy in violation of the antitrust laws, he must show that he sustained injury from the illegal conduct. *Id.* at 1356. In addition, according to the Court, the issue of fact must be "genuine". It is not sufficient that the responding party simply show doubt as to the material facts, he must affirmatively demonstrate with specific facts that there

is a genuine issue for trial. *Id.* Although the Court noted, on summary judgment, inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing the Motion, it stated that the antitrust laws limit the range of permissible inferences from ambiguous evidence in any §1 case. *Id.* at 1356-57. Thus, conduct as consistent with permissible competition as with illegal conspiracy, does not, standing alone, support the inference of antitrust conspiracy. *Id.* at 1357.

In order to establish a § 1 Sherman Act violation, a plaintiff must establish four elements: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant markets; (3) that the objects of and the conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy. *See Martin B. Glauser Dodge Co. v. Chrysler,* 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *Tunis Bros. Co. v. Ford Motor Co.,* 763 F.2d 1482, 1489 (3d. Cir. 1985); *Pontius v. Children's Hospital,* 552 F. Supp. 1352, 1373 (W.D. Pa.1982). Petitioner has failed to establish a genuine issue of material fact as to any of these essential elements of a Sherman Act claim.

1. Petitioner Has Not and Cannot Establish the Existence of any Contract, Combination or Conspiracy

Petitioner alleges that respondent Amster, as a corporate officer and/or employee of respondent Delaware Valley, acting for his own interest and outside the interest of respondent Delaware Valley conspired with respondent Delaware Valley to unlawfully preclude petitioner's inclusion on the emergency room rotation list in violation of §1 of the Sherman Antitrust Act (A. 13).

It is well-settled that §1 of the Sherman Antitrust Act does not preclude "wholly unilateral conduct". *Copperweld Corp. v. Independent Tube Co.*, 467 U.S. 752, 770-71 (1984). Therefore, in order to establish a violation of §1, a plaintiff must prove that two or more distinct entities agreed to take action against the plaintiff. *Weiss v. York Hospital*, 745 F.2d 786,813, (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1777 (1985).

The general rule is that officers and/or employees of the same firm do not provide the plurality of actors imperative for a §1 conspiracy. *See, e.g., Copperweld Corp. v. Independent Tube Co.*, 467 U.S. at 769. A narrow exception to this rule exists if the officer and/or employee is found to be acting for his own interest, and outside the interest of the corporation. *Copperweld, supra.*, 467 U.S. at 769; *Weiss, supra.*, 745 F.2d at 813 & n.43. In such a situation, an officer or employee is legally capable of conspiring with the corporation for purposes of §1. *See, e.g., Johnston v. Baker*, 445 F.2d 424, 426-27 (3d Cir. 1971).

Johnston, however, involved a conspiracy between a non-employee and an employee and a finding by the Court that the defendants had independent personal reasons for achieving the corporation's objectives. *Id.* at 426-27. The present situation involves only *one* alleged employee or corporate officer. Therefore, the Third Circuit in *Johnston*, also did not need to address the precise issue here, *i.e.*, whether one individual employee or officer may be the corporation's sole co-conspirator.

Moreover, in the cases which have found that officers or employees have been legally capable of conspiring with the corporation, courts have found that the employees have acted for their own interest and outside the interest of the corporation. *See, e.g., Weiss, supra.*, 745 F.2d at 813 & n.43. That is, the employee has acted outside the scope of his employment to further an

objective mutually beneficial to himself and the corporation. *See Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1971).

Here, petitioner asserts that respondent Amster acted on behalf of respondent Delaware Valley. As Chairman of the Department of Surgery and Chief of the Division of Orthopedic Surgery, respondent Amster was required, pursuant to the Medical Staff By-Laws (A. 259) to "develop and implement departmental programs" for "privileges delineation." Pursuant to said by-laws, respondent Amster developed and implemented, subsequent to receiving Board approval, rules and regulations governing inclusion on the emergency room rotation list (A. 322).

Importantly, noticeably absent from the record is even the slightest indication or argument that the criteria allegedly developed by respondents Amster and Delaware Valley, allegedly the product of improper motives, were in any way, shape or manner, improper, illegal or anti-competitive. On the contrary, the criteria were pro-competitive and, as the Third Circuit duly noted, the criteria were "objective" and focused on issues that were "obviously a matter of serious concern" to respondent Delaware Valley.

Even assuming *arguendo,* that respondents were legally capable of conspiring together, the facts of this action preclude such a determination. Those cases which have recognized that employees acting for their own interests and outside the interests of the corporation may legally conspire with the corporation are factually distinguishable from the present situation. In the cited cases, the employee, while acting outside the scope of his employment, has been pursuing his own economic interests *as well as* those of the corporation. Here, respondent Amster's actions, all allegedly outside of his interests in his capacity as an employee or officer at respondent Delaware Valley, are allegedly *adverse* to the best interests of respondent Delaware Valley (A. 13,

para. 31). This situation is irreconcilable with the definition of a conspiracy.

A conspiracy or combination must include a "meeting of the minds" in an "unlawful arrangement." *A.M. Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946); *H&B Equipment Co. v. National Harvester,* 577 F.2d 239, 245 (5th Cir. 1978). Thus, even if petitioner's allegations that respondent Amster was motivated solely by his own personal desires are accepted as true, there can be no conspiracy because there was no meeting of the minds between the respondents. Petitioner in his Complaint admits that "Defendant Amster as a corporate officer and/or employee acted contrary to the interests of defendant Delaware Valley by denying Plaintiff Cooper access to emergency room privileges." (A. 13, para. 31). Therefore, respondent, Delaware Valley could not logically conspire with another against its own self-interest. Since petitioner readily admits that the acts alleged of respondent Amster were contrary to the interests of respondent Delaware Valley, there could have been no meeting of the minds between respondents, such that an essential element in the definition of conspiracy is lacking.

Petitioner has failed to allege or provide any facts that would show a plausible motive for respondent Delaware Valley to enter into a conspiracy. To the contrary, respondent Delaware Valley would have every incentive *not* to engage in a conspiracy to protect the financial position of a member of its staff, for the likely effect would be to generate losses for respondent with no corresponding gains. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 106 S.Ct. 1348, 1361 (1986).

Finally, assuming *arguendo* that petitioner did allege a plausible motive for respondent Delaware Valley to enter into a conspiracy, without more, petitioner cannot sustain a viable §1 cause of action.

2. Petitioner Has Not and Cannot Establish Any Adverse, Anti-Competitive Effects Within The Relevant Markets

Petitioner has also failed to establish a genuine issue of material fact as to the requirement of a restraint of trade. Although the literal language of §1 of the Sherman Act declares "every" contract, combination or conspiracy in restraint of trade to be illegal, courts have held that the Sherman Act proscribes only unreasonable or undue restraints of trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60-62 (1911); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979). A challenged activity which appears on its face to restrain trade, must be examined for its purpose, scope and effect to determine whether the agreement merely regulates and promotes competition, or supresses and thus, destroys competition. *See Board of Trade of Chicago v. United States*, 246 U.S. 231, 238-40 (1918).

In determining whether a challenged activity constitutes an unreasonable restraint of trade, courts engage in two different legal analyses: the *per se* analysis and the rule of reason analysis. The *per se* analysis applies to certain types of anti-competitive conduct because of their pernicious effect on commerce and lack of any redeeming value. For these types of conduct, an adverse effect on competition is presumed. *See Nat'l Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) Courts have held that practices such as price fixing, division of markets, group boycotts and tying arrangements may constitute *per se* violations of §1 of Sherman Antitrust Act. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-48 (1982). Although the petitioner, in his Complaint, did allege a *per se* violation of the Sherman Antitrust Act (A. 13, para. 33), decisions of numerous federal courts show that the rule of reason analysis should apply.

The "rule of reason" analysis applies if the challenged activity's effect on competition can only be evaluated by analyzing facts peculiar to the business, the history of the restraint, and the reasons for its imposition. *See Nat'l. Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). In analyzing a claim of restraint of trade under the rule of reason analysis, the fact finder must weigh all of the procompetitive benefits against the anti-competitive effects of the challenged activity to determine whether that activity is an unreasonable restraint of trade. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Courts agree that generally the rule of reason analysis should be applied to antitrust cases in the health care setting. In *Weiss v. York Hospital*, 745 F. 2d 786 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), the Third Circuit applied a *per se* analysis to the antitrust claims of a class of osteopathic physicians based upon the denial of staff privileges at a hospital. The Court, however, reasoned that the hospital's actions constituted a group boycott, which is *per se* illegal under §1 of the Sherman Antitrust Act. *See United States v. General Motors Corp.*, 384 U.S. 127, 145-46 (1966).

The *Weiss* Court, however, recognized that in staff privilege cases that implicate the degree of professional ability, the rule of reason analysis should apply. *See, Weiss, supra.*, 745 F.2d at 820-22. *See also, Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir. 1988). In addition, application of the *per se* analysis is inappropriate when a plaintiff cannot show that the *sole* reason for the defendant's actions was to control his access to the market place. *See Int'l Salt Co. v. United States*, 332 U.S. 392 (1947); *Friedman v. Delaware County Memorial Hospital*, 672 F. Supp. 171, 189-90 (E.D. Pa. 1987), *aff'd.*, 849 F.2d 600 (3d Cir. 1988) (*per se* analysis inappropriate because physician's dismissal from hospital staff may be based upon motive to promote quality medical care and not solely to deny plaintiff access to marketplace).

The criteria for scrutinizing the legality of a restraint of trade under the rule of reason was articulated by Justice Brandeis in *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918):

> *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.* To determine that question, the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238 (emphasis added).

Although the United States Court of Appeals for the Third Circuit, in its Opinion, did not articulate the standard that it applied in determining that petitioner did not have a viable cause of action under the Sherman Antitrust Act, the Court's reasoning is consistent with the rule of reason analysis. The Court reasoned that the challenged restraint, objective criteria determining the eligibility of practitioners for inclusion on the emergency room rotation roster, was based upon the competency of physicians, a matter of serious concern to respondent Delaware Valley and was therefore reasonable.

The rule of reason analysis and not the *per se* analysis is appropriate in this case inasmuch as the criteria implicate the issue of physician competence and have a pro-competitive purpose and effect.

In this case, the alleged restraint of trade consists of objective criteria determining the eligibility of practitioners for inclusion on the emergency room rotation roster. The criteria consist of the following:

1. Completion of an AOA approved internship and an AOA approved residency;

2. Certification in orthopedic surgery by the American Osteopathic Academy of Orthopedics;

3. Status as an active staff physician for at least three (3) years; and,

4. Admission to the Orthopedic service of at least 50 patients per year from the physician's practice.

(A.322, 325). Petitioner does not contend that he satisfies these four criteria, nor does he challenge the legitimacy of the criteria. Moreover, the United States Court of Appeals for the Third Circuit held that these criteria did not constitute an unreasonable restraint of trade. The Court stated:

> The hospital has adopted objective criteria governing the eligibility of physicians for the referral list. Because these standards focus on the doctors' years of experience and practice, they are relevant to professional competence, obviously a matter of serious concern to the hospital which could be held liable for negligently referring a patient to an incompetent staff member. As the District Court found, Plaintiff was neither singled out for special treatment, "nor has he pointed to anything which suggests that [the criteria do not express] a perfectly legitimate and reasonable policy." We conclude that the Hospital's policy does not violate the antitrust laws.

(Petitioner's Appendix at p. A-7).

Petitioner contends that the criteria nonetheless constitute an unreasonable restraint of trade because they were allegedly formulated and applied based upon an improper and anti-competitive motivation. Petitioner cites four cases to support his proposition that an alleged

anti-competitive motivation *alone* may constitute a violation of §1 of the Sherman Antitrust Act. These cases are entirely inapposite to the instant case and are quoted out of context. Specifically, none of the four cases cited involved objective criteria that were facially pro-competitive and related to a reasonable hospital policy. Moreover, none involved application of such criteria for the limited purpose of qualifying a physician for a referral rotation list, as opposed to staff privileges in their entirety.

In *Williams v. Kleaveland*, 534 F. Supp. 912 (W.D. Mich. 1981), a hospital revoked the staff privileges of a physician based upon its determination that his medical care was substandard. The Plaintiff contended that there was no serious question of his performance or competence, but rather the charges against him were merely a pretext to eliminate him as a competitor because of his intention to establish a health maintenance organization, which would compete with the hospital. *Id.* at 918.

Petitioner cites *Williams* for the proposition that "even where the good faith standards established by the hospital must be presumed it is still a relevant issue as to whether or not the individual doctors applying the standards acted for illegal purposes." On the contrary, *Williams* actually involves the issue of the propriety of summary judgment when it is not clear that the standards were applied at all. The *Williams* Court noted that it had to presume the good faith of the members of the Peer Review Committee that revoked the plaintiff's privileges and held that the plaintiff bears the burden of proving that the Committee's physician-members acted with and anti-competitive motive and not to maintain the legitimate standards of the hospital.

In the instant case, petitioner does not contend that the standards of the respondent medical center were not applied, but rather asserts that the adoption of those

facially legitimate and reasonable standards was based upon anti-competitive motive.

Similarly, in *Pontius v. Childrens' Hospital*, 552 F. Supp. 1352, 1372 (W.D. Pa. 1982), a physician contended that the hospital's decision not to retain him on staff constituted an unreasonable restraint of trade. Again, the Court was faced with the situation whereby it was required to determine whether the decision regarding the plaintiff's staff privileges was based upon legitimate standards of medical practice or solely for anti-competitive motives. Where the standards are not objective written criteria, as are those in this case, a court must determine whether the standards are reasonable and whether they were actually applied.

Again, in *Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir. 1988), the Third Circuit Court of Appeals was required to determine whether a physician's staff privileges were terminated based upon hospital standards or anti-competitive motives. The court held that the District Court erred, as a matter of law, in applying the administrative law standard of review — analyzing whether the hospital's decision was based upon "substantial evidence" — as opposed to the standard of review for Motions for Summary Judgment — analyzing whether the plaintiff had established any genuine issue of material fact as to the grounds for the termination of his privileges. This issue is not presented here.

The Court then exercised its powers of plenary review and determined that the plaintiff had raised a substantial issue of fact regarding whether the hospital's decision to revoke his privileges was based on his incompetence or on anti-competitive motives. *Miller* has no relevance to this case where there is no question of fact as to the reasonableness and the application of the criteria at issue.

Petitioner asserts that this Court's recent decision of *Patrick v. Burget*, 108 S.Ct. 1658 (1988), stands for the proposition that a plaintiff has stated a cause of action for

violation of the antitrust laws when he has pleaded "that there has been an improper and anti-competitive motivation for criteria, standards, regulations or actions of hospitals which appear, on their face, to be embodiments of legitimate and reasonable policies." Petitioner asserts that the decision in *Patrick* is dispositive of this case. Unfortunately for petitioner, however, the *Patrick* decision does not stand for this proposition at all.

The Supreme Court's decision in *Patrick* was confined to determining whether the *Parker* State Action Doctrine protected the peer review activities of a hospital and state Board of Medical Examiners from antitrust challenge. Nowhere in the *Patrick* opinion does the Court discuss, much less decide, the validity of the plaintiff's cause of action for violation of the antitrust laws. Thus, petitioner's broad statement that the decision of the United States Court of Appeals for the Third Circuit in the instant case is in conflict with *Patrick* is in error.

Furthermore, the facts of the *Patrick* case are distinguishable from those of the instant case for the same reasons as the other three cases petitioner cites. The plaintiff in *Patrick* challenged a peer review decision that was not based upon objective, written criteria. Thus, the pertinent antitrust analysis required a determination of whether the decision to revoke the plaintiff's privileges was based upon health care standards or was based upon an anti-competitive motive. In this case, there is no issue as to the legitimacy of the criteria, which have not been challenged, and there is no issue as to whether the criteria were applied. The *Patrick* decision is entirely inapposite to the instant case.

Thus, these decisions simply do not stand for the broad proposition for which petitioner cites them. Moreover, it is well-established that mere anti-competitive intent is not sufficient to sustain an antitrust cause of action. A plaintiff must satisfy the other essential elements of this claim. *See O.S.C. Corp. v. Apple Computer,*

Inc., 792 F.2d 1464 (9th Cir. 1986); *SI Handling Systems, Inc. v. Heisley*, 658 F. Supp. 362 (E.D. Pa. 1986); *Stone v. William Beaumont Hospital*, 1983-2 Trade Cas. (CCH) ¶ 65,681 (Oct. 18, 1983).

Moreover, to be unreasonable, the restraint must not only injure the petitioner but must also unreasonably restrain competition. *See Jefferson Parish District No. 2 v. Hyde*, 466 U.S. 2, 29 (1984). As this Court has emphasized on numerous occasions, the antitrust laws were enacted for "protection of competition, not competitors." *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S.Ct. 690, 697 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 297, 320 (1962). Injury to a plaintiff is *not* enough to prove injury to competition. *See O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1469 (9th Cir. 1986). Petitioner simply has not and cannot establish an injury to competition generally. The Complaint and the Record are devoid of *any* scintilla of evidence or even facts or allegations of such injury to competition. Indeed, petitioner's Petition for a Writ of Certiorari to this Court does not even mention the requirement much less attempt to argue that it is satisfied.

In short, in this case, the criteria do not impose any injury on competition generally. Rather, as was recognized by the Court of Appeals for the Third Circuit, the criteria are relevant to professional competence and reasonable, and, if anything, are *pro-competitive*, permitting a hospital to better compete in the health care market. Thus, the criteria do not constitute an unreasonable restraint of trade in violation of the Sherman Antitrust Act.

3. Petitioner Has Not and Cannot Establish The Existence of an Antitrust Injury

Petitioner has also failed to establish an antitrust injury cognizable under the Sherman Antitrust Act. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S.

477, 489 (1977), the United States Supreme Court observed that a plaintiff,

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and which flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 489 (citing *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 125 (1969)).

To survive a Motion for Summary Judgment in a private antitrust action, a plaintiff must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused the plaintiff to suffer a cognizable injury. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 106 S.Ct. 1348, 1355-56 (1986). The plaintiff must have evidence to support his claim. *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2554 (1986). Petitioner has failed to show any injury cognizable under the Sherman Antitrust Act. The United States District Court for the Eastern District of Pennsylvania in its Memorandum Opinion emphasized that petitioner has not sustained any injury by virtue of the allegedly anticompetitive conduct of the respondents. The Court stated:

> This action is frivolous because plaintiff is not being precluded from doing anything by any of the defendants. He may find his own patients, accept patients from anyone who will refer them, admit patients to the hospital, treat them in the emergency room, and use any of the hospital's facilities. The sole basis of

> his suit is that the hospital refers patients to other doctors, but does not refer patients to him. This is in keeping with the hospital's policy that it will not refer patients to a doctor who has been on its staff for less than five (5) years unless the doctor is associated with other qualified doctors. Plaintiff was not singled out for this treatment, nor has he pointed to anything which suggests that this is not a perfectly legitimate and reasonable policy. There is nothing in the law that requires the hospital to be his bird dog just because it is the bird dog for other doctors who have been associated with it for a longer period of time. Plaintiff may wish that the hospital would refer patients to him, but the Sherman Act does not require it to do so.

(Petitioners Appendix at p. A-1 — A-2). Petitioner did not challenge that portion of the District Court's Opinion and has failed to establish that there is a genuine issue of material fact as to whether any allegedly anti-competitive conduct of respondents caused him to suffer a cognizable injury.

For each of the reasons stated, petitioner has failed to establish the existence of any element essential to his case and upon which he must bear the burden of proof at trial. Thus, summary judgment was not only appropriate, but mandated. *See Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986) (moving party is entitled to judgment as a matter of law because non-moving party failed to make a sufficient showing on an essential element of the case with respect to which she has burden of proof).

For each of the reasons stated, this Court should refrain from review of this matter.

CONCLUSION

The United States Court of Appeals for the Third Circuit correctly affirmed the District Court's decision to dismiss petitioner's Civil Action. Petitioner has not challenged the propriety and appropriateness of the legitimate criteria applied to determine the eligibility of a physician for inclusion on the emergency room rotation roster. Furthermore, by focusing on the use of experience and credentials of a physician, the criteria are designed to measure competency and are only procompetitive, enhancing the quality of services provided in respondent Delaware Valley's emergency room and enhancing respondent Delaware Valley's position within the health care market. Nowhere is it even suggested that any genuine issue of material fact exists regarding the legitimacy of the criteria for inclusion of a physician on the emergency room rotation roster.

The United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit appropriately considered and reviewed this case and properly determined that the petitioner should not be entitled to pursue the antitrust claim. Accordingly, this Honorable Court must deny petitioner's Petition for Certiorari.

Respectfully submitted,

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